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## Mission Statement

The primary purpose of the *Illinois State Education Law and Policy Journal* (formerly *Illinois School Law Quarterly On-Line*) is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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## Developments in the Courts

### Students' Rights

A new area of litigation has perhaps reared its head with the purported filing of lawsuits in Virginia and Arizona against the use of Turnitin.com, a company hired by many schools to help combat the rising threat of plagiarism among students. The basis for the two suits is that the requirement of the school for students to submit works to Turnitin.com, on which the students hold copyrights, if a violation of the U.S. copyright law. The violation comes because Turnitin.com places all works submitted into an electronic archive. In its response, iParadigms LLC, Turnitin.com's parent company states that its use of the electronic archive falls under the 'fair use' clause of the U.S. copyright law.

Price v New York City Bd. of Educ., 109703/06 (N.Y. Sup. Ct. May 7, 2007): The New York City Department of Education has a policy prohibiting students from bringing cell phones to school without permission. Parents sued stating that, although prohibiting the use of cell phones was within the power of the school district, to prohibit the possession of a cell phone was a violation of the students' constitutional rights to be able to communicate with parents between school and home. The parents argued that there was no reasonable basis for the policy. In upholding the district's policy, the court held that there was a rational basis for the rule. Specifically, to just prohibit use rather than possession would require a higher level of enforcement which would be detrimental to the pedagogical mission of the school. More over, with the constantly changing technology involving cell phones, a less comprehensive policy could leave the school in the position of constantly having to revisit and revise the policy to keep up with the technological changes. Most importantly, however, the court found no constitutional right to "bear cell phones!"

Board of Trustees, Cut Bank Pub. Sch. V Cut Bank Pioneer Press, No. 06-0074 (Mont. May 8, 2007): Cut Bank Public schools held a hearing in closed session to discuss the discipline of two students alleged to have been involved in shooting other students with a BB gun on school property. In reconvening in open session, the board approved its action without going into detail about the discipline and by referring to the students only with a number. When the local newspaper, the Cut Bank Pioneer Press, requested information regarding the action taken it was denied and so a lawsuit followed. Upon reaching the Montana Supreme Court, the court ruled that the newspaper was entitled to a redacted copy of the school board's records regarding the disciplinary proceedings, stating that access to such was not forbidden under FERPA. In the rationale of the court, once the record is redacted identifying information included does not pertain to an individual student thus is not an "educational record" under the terms of FERPA. The court also employed a two-part test pertaining to the privacy expectations of the student: (1) whether the person involved had a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable. After employing the test, the court once again found that the request was not outweighed by privacy interests.

Zamecnik v Indian Prairie Sch. Dist. #204, No. 07-1586 (N.D. Ill. April 17, 2007): In protest during the "Day of Truth" two students at Neuqua Valley High School planned to wear

t-shirts which said "Be Happy, Not Gay." The school forbid them from wearing the shirts on the grounds that the message was negative and therefore in violation of the school's policy on tolerance. Moreover, the school stated that the message on the shirt posed a risk of disruption. The two students filed suit to obtain a preliminary injunction to prevent the school of keeping them from wearing the shirts. They alleged that the actions of the school district violated their freedom of speech and religion. In addition, they stated that the ban was unconstitutionally overbroad and vague; constituting an impermissible prior restraint on speech. In denying the students request for an injunction, the court framed the issue as "whether a high school may prohibit negative speech about homosexuality as part of its pedagogical mission to promote tolerance of differences among students." In a 1996 case out of the Seventh Circuit, Muller v Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996) the Seventh Circuit had upheld restrictions on student speech "that is insulting to the psyches of other students . . . and that a school's pedagogical interests are taken into consideration even if the speech is not school-sponsored." The court found that the district did have a legitimate pedagogical interest in promoting tolerance for all students and that the district was only attempting to regulate derogatory speech.

M.B. v Liverpool Cent. Sch. Dist., No. 04-1255 (N.D.N.Y. Mar. 29, 2007): Plaintiff was an elementary school student who had, in the past, distributed religious materials to classmates during non-instructional time. Officials informed plaintiff's mother that if her daughter wished to distribute items that she needed to comply with the district's policy on materials distribution. Ultimately the school district denied plaintiff's request to distribute the materials because it found them in violation of two portions of the policy: (1) Plaintiff's request did not designate the entire class as recipients; and (2) the proposed manner of the distribution, specifically the proselytizing nature of the flyer, combined with the young age of the audience posed a potential Establishment Clause violation. Although the court found that the school district, having established a limited open forum, did have the power to restrict the "time, place, and manner" of the distribution, when the policy was measured against the "material and substantial disruption" test outlined in Tinker v Des Moines, the policy proved to be an unconstitutional restriction on private speech.

Gay-Straight Alliance of Okeechobee High Sch. V Sch. Bd. of Okeechobee County, No. 06-14320-CIV (S.D. Fla. Apr. 6, 2007): When the Gay-Straight Alliance was denied recognition as a non-curricular club, the members sued the school district under the Federal Equal Access Act. While the school district agreed that the school had established a limited open forum, it argued that its action to deny recognition of the group fell under one of the "safe harbor" exceptions of the EAA. Specifically, the school district said that the motive for its decision was to maintain order and discipline on school premises and to protect the well-being of students. According to the school, the web site for the GSA contained links to other web sites with obscene and sexually explicit material. Moreover, the clubs goal to promote safe sex was directly contrary to the curriculum of the school which promoted an abstinence only message. The court was not persuaded and found in favor of the plaintiff students.

D.B. v Lafon, No. 06-5982 (6th Cir. Feb. 21, 2007): When several student showed up at the high school wearing t-shirts with the confederate flag, the principal told them that they need to either cover up the symbol, change their t-shirts, or face suspension because the school code prohibited wearing clothing that "causes disruption to the educational process." The students filed

suit alleging that the school district had allowed other controversial symbols such as foreign flags, Malcolm X symbols, and political slogans and no disruption to the educational process occurred. The district responded with information showing that during the 2004-05 and 2005-06 school years the school had experienced racial tensions to a degree that the county sheriff had posted deputies at the school. The question before the 6th circuit was whether the district had sufficient reason to believe that the wearing of the confederate flag would cause a disruption or whether that assumption amounted to an impermissible prior restraint of constitutionally protected speech. In finding for the school district, the court made a rather novel reading of Tinker v Des Moines.

The general belief in the legal community is that the "material and substantial disruption" standard espoused in Tinker had to be "actual" and not merely anticipated. In the Tinker case the Des Moines School board, in light of campus unrest at area educational institution, had proactively instituted a policy barring the wearing of black armbands in protest of the Viet Nam War. The United States Supreme Court stated that such symbolic speech could be regulated if it caused a material and substantial disruption to the educational environment. However, since Des Moines had forbidden the speech because of anticipated disruption, they had enacted an impermissible prior restraint.

The 6th Circuit read the Tinker decision to set the precedent that the banned form of expression itself did not have to have caused a prior disruption (i.e. the confederate flag) but that the question was whether the banned expression was of a type likely to cause disruptions of the type previously seen at the school. So, although there was no history of the sight of a confederate flag had caused disruptions at the school, because there was a "societal" belief that the confederate flag was racist, and because there had been previous racial tensions at the high school, that the wearing of the confederate flag could be regulated because of the likelihood that it would cause another racially motivated incident at the school. Editor's Note: What a boot-strapping argument the 6th Circuit has put forward! As I, and many other legal scholars, read Tinker it is precisely this type of prior restraint which was strictly prohibited by the United States Supreme Court. If the wearing of the confederate flag is likely to cause problems, a better solution would be to allow the students to wear the shirts but have a plan in place to immediately squelch any disruption. Then, in future instances, the district will have an actual disruption caused by a specific expression and there is no question that regulation is constitutional.

**Finance**

Nebraska Coalition for Educ. Equity and Adequacy v Heineman, No. 05-1357 (Neb., May 11, 2007): Once again a state supreme court has ruled that perceived inequalities in financing public education is a policy question for the legislature rather than a legal question for the courts. This line of reasoning has twice been followed in the state of Illinois first in the McInnis case and then in the Edgar case. In Heineman, the Nebraska Supreme Court dismissed the suit brought by the Nebraska Coalition for Educational Equity and Adequacy (NCEEA) stating that it posed a nonjusticiable political question. In its suit, NCEEA had sought a declaration that Nebraska's education funding system was unconstitutional under the Nebraska constitution and an injunction against the implementation of the system. In affirming the lower court, the Nebraska Supreme Court relied on the United State Supreme Court's decision in Baker v Carr, 369 U.S. 186 (1962) which stated that the duty to provide a public education is "clearly directed to

the [state] Legislature and that the duty to adopt the method and means to furnish free instruction has been left by the state Constitution to the Legislature." Just as the Illinois Supreme Court, the Nebraska Supreme Court stated that without qualitative standards being provided, that it was impossible for a court of law to determine if there was a lack of equal protection. Instead, the specific lack of enumerated qualitative standards is an indication that the drafters of the constitution intended to leave questions regarding education to the purview of the legislature.

Oklahoma Educ. Assoc. v Okla., No. 103,702 (Okla. May 8, 2007): Another state has jumped on the "education funding is a policy issue for the legislature." The Oklahoma Education Association had challenged the state school funding scheme alleging injury to students, school districts and members of the OEA. While dismissing the lawsuit primarily on a lack of standing issue, the court went on to say that under the terms of the Oklahoma state constitution that the funding of public schools was within the exclusive authority of the state legislature, not a judiciable issue by the courts.

It looks like the state of Ohio may finally have come to its senses. Governor Ted Strickland is trying to end the state's year old private school voucher program called Ohio EdChoice Scholarships stating that it would free up $13.8 million which could be spent on the state's public schools. The vouchers are available to students who attend, or would attend, public schools which have received the state's lowest academic ratings for at least two of the last three years. Governor Strickland characterizes the program as "undemocratic" and an abandonment of public schools. He contends "[vouchers] represent the use of public tax dollars without any public oversight, without the public having the ability, through their elected representatives to have any influence over (school) hiring, firing, curriculum, or discipline procedures." Editor's Note: Unfortunately, the Republican controlled legislature will most probably continue the program. At least someone has finally spoken up to raise the reality that private school voucher programs have not been shown to improve education but have been shown to seriously harm public schools by eroding their already meager state funding.

Zuni Public Sch. Dist. No. 89 v Dep't of Educ., No. 05-1508 (U.S. S. Ct. April 17, 2007): The federal Impact Aid Act provides funding for school districts whose ability to finance their schools is adversely impacted by a federal presence in the district. This presence may be caused by an abundance of tax exempt federal property or many federal employees with school age children. The statute generally forbids states from reducing state aid because of any federal aid obtained under the act. There is, however, a loop hole which allows states to factor in federal aid in any type of "equalizing" formula used by the state. In New Mexico, two school districts filed suit claiming that the state's interpretation of that federal law unfairly deprived them of resources. In a 5 – 4 decision the United States Supreme Court rejected the argument of the school district, upholding the state equalizing regulation as a reasonable method of carrying out the purpose of the federal legislation. Editor's Note: Perhaps the most interesting thing about this Supreme Court decision is the way in which the justices aligned themselves. Breyer wrote the opinion with Stevens, Kennedy, Ginsburg and Alito joining. Not often are we going to see Ginsburg and Alito on the same side. Then, Scalia filed a scathing dissent, joined by Roberts and Thomas (three folks we would expect on the same side). Not expected, however, is that Souter joined Scalia's dissent! Folks, we won't see those bed fellows together very often!

**Personnel**

An interesting case out of the Des Moines Public Schools involves the termination of an African-American bus driver for muttering the word "nigger" under her breath after an altercation with an unruly African-American student. After being terminated, the school district opposed her attempt to obtain unemployment pay on the grounds that her actions had constituted misconduct. During and administrative appeal the bus driver admitted that after being threatened by the student that she had muttered the n-word under her breath but denied that it was directed at the student. In finding for the bus driver, the administrative law judge concluded that although the driver had exercised poor judgment, she had not committed misconduct and therefore was entitled to unemployment pay. Editor's Note: I wonder how this termination would be reported to a future employing school district under the legislation currently being introduced by Representative Brady. Is this the type of "dangerous behavior against students" that would trigger the duty of the school district to divulge should references be requested? Or, would the fact that an Administrative Law Judge found that there was no misconduct erase this altercation from the record?

With the passing of a new collective bargaining agreement by a 61% to 38% vote, teachers in the state of Hawaii will now be subject to reasonable-suspicion and random drug and alcohol testing. School districts in both Kentucky and Tennessee already randomly test teachers for drugs. The policy at the Knott County, Kentucky schools was challenged in court but the 4th Circuit upheld the testing on the grounds that schools have the duty to ensure a safe environment for children. The situation in Hawaii is somewhat different in that the provision is not a unilateral school policy but a clause in a collectively bargained agreement. Editor's Note: This is should not be a surprise to anyone. When the United States Supreme Court upheld random drug testing for students participating in extra-curricular activities in the Earl case it ignored the reason of the Court's approval of the drug testing of athletes in Vernonia. Instead, the Court based its decision on societal drug use and the school's "in loco parentis" duty to provide a safe environment for students. At the time I suggested to the attorneys at the IEA that the Earl case could prove dangerous for teachers because using the "safe environment" argument that the random drug testing of teachers would likely follow. At the time my concerns were dismissed by the attorneys at the table. Wonder if they would think the same way now?

Ferrell v Gwinnett County Bd. of Educ., 2007 WL962853 (N.D. Ga. Mar. 30, 2007): Under a ruling by the federal district court, school resources officers were considered exempt employees of the school district. Rather than just relying on local law enforcement to provide safe schools, the Gwinnett County schools established a school resource office program using high qualified and experienced police officers. Editor's Note: If these individuals are employees of the school district but are also police officers, are the still acting under the color of state law thus needing probable cause to search students or are the akin to school administrators therefore able to search students solely on reasonable suspicion? Does it matter who pays the salary of the individuals? How does that affect schools in central Illinois in which an individual from the local police force is assigned as a school resource officer to a specific school district? These are questions which should be considered before entering such an agreement.

Lee v York County Sch. Div., No. 06-1363 (4th Cir. May 2, 2007): William Lee, a Spanish teacher in Virginia, was told to take down items from his bulletin board including a poster publicizing the National Day of Prayer, a news article entitled "The God Gap" outlining differences between President Bush and U.S. Senator John Kerry, an article about Attorney General John Ashcroft leading White House staffers in bible study sessions, and a news article and newsletter about the missionary activities of a Virginia high school student. Lee sued the school district alleging a violation of his freedom of speech. The 4th circuit ruled that the school district did not violate Lee's freedom of speech because the "speech" in question was curricular it was not per se about a matter of public concern and therefore not protected by the Constitution. The bulletin boards are owned by the school and controlled by the school as a place on which to extend the learning curriculum. The court stated that curriculum by definition imparts particular knowledge and is not limited to speech related to traditional classroom instruction; it also includes social and moral values a teacher believes students should learn.

Mayer v Monroe County Community School Corp., 474 F.3d 477 (7th Cir. 2006): A seemingly innocuous case from the 7th Circuit may have some long ranging effects on future conduct of teachers in the classroom and essentially destroys the idea of academic freedom in K-12 schools – definitely for probationary teachers. Mayer was a probationary elementary teacher in Monroe County, Indiana. During a discussion on current events, one of the students asked Mayer if she had ever participated in a political demonstration. In response she stated that once, when she drove pass a demonstration against the war in Iraq and saw a sign stating "Honk for Peace," she honked the car's horn in support. Some parent's complained to the principal and ultimately Mayer's contract was not renewed. In affirming the lower courts ruling for summary judgment on behalf of the school district, the circuit court affirmed the long standing precedent that, while teachers are free to exercise political speech outside of the classroom, that school districts have a great deal of power to restrict what is said within the classroom. Editor's Note: What is rather surprising about this case is the manner in which the political opinion was voiced. Mayer was not the one who brought the topic up nor was she using her classroom as a modified soap box from which to make politically divisive speeches. Instead, she was responding to an innocent and relevant question from a student during an appropriate class discussion. Moreover, when she answered the question she did not divulge a risqué or alarming past activity but rather than she had "honked" is support of peace. Who would not be in support of peace? But the case is what it is, so now in the 7th Circuit which includes Illinois, teachers should be advised to be very careful about what they say in the classroom – even if their "self-censoring" limits the educational experience of the students. My question is, how does this "state forced self-censoring" in actuality differ from pure state censorship? To me it sounds a great deal like what the citizens who lived behind the Iron Curtin had to do on a daily basis to avoid punishment.

**No Child Left Behind**

The U.S. Department of Education has finally agreed that a new assessment is needed for special education students who do not suffer from significant cognitive impairments, but who are operating under an IEP. The Department of Education has released its final regulation to guide states in the creation of tests for special education students who are capable of eventually learn-

ing at grade level, but can not do so on the same time table as their peers. The proposed test must still contain grade level content but they can be "easier" than the test given to the general education students in the grade. The Department of Education flatly refuses to allow out-of-level assessments for special education students emphasizing the importance of ALL students getting access to grade-level content. Editor's Note: This is important even if the special education student is incapable cognitively of understanding that grade level content? For example, say 8th graders should be able to make algebraic calculations. A 13 year old special education student may be only starting the concept of division, yet the Department of Education would insist that the test given to him would contain grade level content which happens to be algebra. I am curious as to how a state would make algebra "easier" such that a student who is just starting to understand simple division would be able to be fairly assessed? It simply makes no sense!

Board of Ed. of Ottawa Twp. High Sch. Dist. 140 v U.S. Dept. of Ed., No. 05-655 (N.D. Ill. March 31, 2007): Speaking of official actions which make no sense, the suit brought by the Ottawa High School District challenging the NCLB as being inconsistent with the IDEA has again been dismissed on the basis that the plaintiff school districts and parents of children with disabilities lacked legal standing to file suit. The court ruled that the plaintiffs had failed to show any injury in fact, although all that was being requested was a declaratory ruling to guide the future behavior of the districts as they attempt to fulfill the competing goals of the NCLB and the IDEA. Editor's Note: Using the reasoning of the court, neither the school district nor the parents will have standing until an actual injury has occurred. This means that the school district must fail AYP under the NCLB such that it incurs penalties, the school district must ignore the IDEA and fail to serve the appropriate students to the extent that the district is sanctioned, or one of the students must sustain an injury of some kind because the school districts fail to provide appropriate IEPs in an attempt to comply with NCLB. That certainly makes sense to me. Let's injure children before a court will take a look at the two laws and guide districts as to how they can comply with both.

**Special Education**

Mr. I. et al. v Maine Admin. Dist. No. 55, No. 06-1368/1422 (1st Cir. Mar. 5, 2007): Under a ruling by the First Circuit, any negative impact a student's disability has on his or her educational performance could qualify as an "adverse effect" for purposes of IDEA's eligibility test. The student at the center of this lawsuit excelled academically but suffered from Ausperger's Syndrome causing her psychological problems, culminating with suicide attempts. Although the staffing team had identified the students as a "qualified individual with a disability" but was not entitled to services because the disability had "no significant adverse effect on education." In finding in favor of the student the court found that "adverse effect on education" goes beyond just academic performance. It also includes non-academic performance such as socialization and communication. The court declined, however, to order the school district to pay the tuition to the private school into which the parents had placed the child during the pendency of the legal action.

Cave v East Meadows Union Free Sch. Dist., 2007 WL 878497 (E.D.N.Y. Mar. 19, 2007): Cave, a high school students, filed a motion for a preliminary injunction to force the school district to allow him to bring his service dog to school. His parents had filed a lawsuit alleging violation of the ADA, Section 504 of the Rehabilitation Act, and several state laws. Cave's parents argued that the service dog was a vital component of Cave's development thus its presence during the day would be crucial to both Cave and the training of the dog. While the court recognized the potential adverse effect on the dog's training should it not be allowed to accompany Cave during the day, the court stated that the rights of a disabled student when in school are not the same as when the student is in other public settings. The court found that neither the ADA nor Section 504 required schools to provide each an every accommodation requested by the student but rather that it give an otherwise qualified person with disabilities" meaningful access to the program or services sought." The special education services already being provided Cave not only met but exceed that standard and consequently the court found for the school district and denied Cave's motion for a preliminary injunction.

Winkelman v Parma City Sch. Dist., No. 05-983 (U.S. May 21, 2007): The United States Supreme Court has ruled that parents may represent the interest of themselves and their disabled child in federal court without the assistance of an attorney. Relying on the wording of the IDEA, the Court found that the parents of a disabled child also have individual, enforceable legal rights which encompass the rights of their child. As a result, they can represent themselves pro se in IDEA claims in federal court. In a 7 – 2 decision, the court concluded that the same power granted to parents by the IDEA to demand a due process hearing or to appeal an administrative determination extended to the parents to assert their rights in federal court.

**Desegregation/Affirmative Action**

American Civil Rights Found. V Berkeley Unified Sch. Dist., No. 06292139 (Cal. Super. Ct. Apr. 6, 2007): California Proposition 209 forbids "discrimination or preference on account of race." The Berkeley Unified School District was sued because three of its programs – the elementary student assignment plan; the admissions policy for BHS's small schools and academic programs; and the admissions policy for the Academic Pathways Project – take race into consideration when making assignments. In upholding Berkeley programs, the court said that since race was only one criteria among several including socio-economic status, and level of parental education, that its use was permissible and not in violation of state law.